

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
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**REVISION OF INDECENCY CASES POLICY** ) GN Docket No. 13-86  
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To: The Secretary  
Attn: The Commission

**COMMENTS OF SAGA COMMUNICATIONS, INC.**

Saga Communications, Inc. (“Saga”),<sup>1</sup> hereby submits its Comments on the Commission’s Public Notice, DA 13-581, released April 1, 2013, *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy* (herein, *Indecency Policy PN*)<sup>2</sup>

Saga urges the Commission, in revisiting its indecency enforcement policies to apply the reasoning in *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1977), which was approved by the Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (herein, *Pacifica Policy*). Saga also urges the Commission to implement a “triage” system to discourage frivolous or unsubstantiated complaints and to identify “cookie-cutter” indecency complaints. These complaints clog the system and harm the public interest by wasting scarce Commission resources. Finally, Saga suggests that the Commission’s resources would be better utilized by referring egregious cases to the U. S.

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<sup>1</sup> Saga is a broadcasting company whose business is devoted to acquiring, developing and operating broadcast properties. The company owns or operates broadcast properties in 26 markets, including 61 FM and 30 AM radio stations and television stations in two markets.

<sup>2</sup> Comments are due by June 19, 2013 (Time extended by *Public Notice*, DA 13-1071, released May 10, 2013.)

Department of Justice for prosecution under Title 18 U.S.C. §1464, rather than investigating allegations of indecent broadcasting as a matter of primary jurisdiction.

As the Public Notice invites comment on specific practices “as well as any other aspect of the Commission’s substantive indecency policies,” Saga expands on these suggestions *infra*.

### **Return to *Pacifica* Policy Enforcement.**

Saga urges the Commission not to take action against licensees for the broadcast of isolated expletives. In most, if not all cases, isolated expletives are uttered as a result of an accident<sup>3</sup> or as an excited utterance.<sup>4</sup> Neither instance should render the broadcaster liable for sanction. The Commission also asks whether the Commission should “treat isolated (non-sexual) nudity the same as or differently than isolated expletives?” Saga believes isolated (non-sexual) nudity should be treated the same as isolated expletives and should not be actionable.

As noted in the *Indecency Policy PN*, after the Supreme Court’s decision in *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307 (2012), the Chairman of the Commission directed the Enforcement Bureau to focus its indecency enforcement resources on egregious cases and to reduce the backlog of pending broadcast indecency complaints. As a result, the backlog of indecency complaints was reduced by 70% (more than one million complaints), “principally by closing pending complaints that were beyond the statute of limitations or too stale to pursue, that involved cases outside FCC jurisdiction,

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<sup>3</sup> For example, a person recording a message may “fluff” the script and through frustration, utter a forbidden word. If that person fails to delete the “fluffed” take, it could be inserted into the station’s program computer system and broadcast through inadvertence.

<sup>4</sup> Rock band U-2 singer Bono’s excited utterance at the “Golden Globe Award” show that has caused such consternation.

that contained insufficient information, or that were foreclosed by settled precedent.”

Saga applauds this effort and urges the Commission to continue to purge its case load in this manner. The Commission seeks comment on “whether the full Commission should make changes to its current broadcast indecency policies or maintain them as they are.”

Saga urges the Commission to treat isolated expletives in a manner consistent with the *Pacifica Policy*.<sup>5</sup> The arguably unwise and possibly unconstitutional policy embarked upon in 2004 in *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd 4975 (2004) should be rejected. That policy was a principal reason the Enforcement Bureau was swamped with more than a million indecency complaints, many of which were ultimately dismissed for the reasons set out above.<sup>6</sup> The fact that the Commission was able to jettison, without action, 70% of the complaints is ample evidence of a failed policy which should not be maintained. However, while those complaints were in the FCC’s system, action on the applications of affected licensees was routinely deferred, and many applications have not yet been cleared. This lack of action results in licensee uncertainty. A licensee might learn of an indecency complaint that had not yet been adjudicated against the licensee. If the licensee desired to sell its station, it could not do so because the Enforcement Bureau notifies the Media Bureau that an indecency complaint is pending before the Enforcement Bureau staff, and the Media Bureau defers action until the complaint is resolved.

Licensees are required to execute “tolling” agreements to extend the 5-year statute of limitations and/or deposit funds in escrow so that the Enforcement Bureau will lift its

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<sup>5</sup> “If a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.”

<sup>6</sup> *Indecency Policy PN*.

“hold” on the application, thus permitting a station sale to be approved. Even if the complaint was one of the million closed, it could have resulted in a hold on any application filed for that station. The solution is to more quickly process and resolve indecency complaints. Focusing Commission action on “egregious” cases, where there is clear intent to violate the prohibition, would be a great first step in indecency regulation.

### **Triage for Indecency Complaints.**

Since the Napoleonic Wars, emergency first responders have observed the principals of “triage;” *i.e.*, the process of determining the priority of patients' treatments based on the severity of their condition. Triage efforts ration treatment for the injured when resources are insufficient for all persons to be treated at once. Likewise, the Commission's Enforcement Bureau has only limited (possibly, insufficient), resources to deal with the glut of indecency complaints that have been filed since the policy change was made in 2004. Returning to the enforcement policy that worked well for 26 years is one way to stem the flow of complaints. Another is to quickly review complaints as they come in and separate them into the following categories:

- Those that are not likely to result in a sanction, or are unsupported by probative evidence,<sup>7</sup> even if the underlying facts are true; and
- Those that are likely to result in a sanction, if the underlying facts are true and supported by probative evidence.

Complaints in the second category may be further subdivided into:

- Those that are serious enough to merit an “enforcement hold” on the station; and
- Those that merit a sanction, but are not so serious to merit an enforcement hold.

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<sup>7</sup> For example, an indecency complaint should only be considered if it is supported by a recording or transcript of the alleged indecent broadcast, and if the complainant is a listener or viewer of the target station.

Complaints in the first category can be dismissed outright without any action, without “flagging” the applications of accused licensees. Dismissal of meritless, unsupported complaints would reduce the Enforcement Bureau’s backlog dramatically and would provide relief for broadcasters, action on whose renewal and assignment applications is delayed or deferred for no good reason. Complaints in the second category could then be processed more expeditiously.

This plea for relief is not mere rhetoric. Saga is the victim of such meritless complaints. For example, a Saga subsidiary, on December 1, 2005, filed a routine application for renewal of license of one of its radio stations. After the licenses for other stations in that state group were renewed, inquiry was made to the Enforcement Bureau. That inquiry revealed that there were complaints alleging the broadcast of indecent language on the station, which resulted in an enforcement hold on the renewal application. Further inquiry disclosed the specific language alleged to have been broadcast. Counsel has twice written the Enforcement Bureau seeking resolution of the matter, without positive results. In one letter, counsel specifically addressed each allegation and demonstrated that the language, even if broadcast, was not actionable under FCC precedent. Moreover, the last instance of which Saga is aware occurred on February 5, 2008, so a forfeiture is now barred by the 5 year statute of limitations, yet action on the renewal application is still deferred, nearly 8 years later.

In addition, Saga’s television subsidiaries, and virtually every other licensee of a network affiliated television station, has been adversely affected by mass complaints solicited by certain advocacy groups. One of the groups provides on its web site a complaint form to file with the FCC for what it identifies to website visitors as incidents

of indecent broadcasting. While Saga in no way seeks to stifle public complaint, these mass complaint organizations encourage the filing of thousands of complaints. In some cases, Saga has heard, complaints have been filed against stations by complainants who have never viewed the target station or who do not reside in the viewing area. The complaints are often unsupported by any evidence linking the material to a station actually listened to or viewed by the complainant. Nonetheless, due to the sheer volume of complaints, the FCC can't process them promptly and, as a result, action on television license renewal applications has been long deferred. Both of Saga's television stations face this situation. The renewal applications were filed in 2006 and, 7 years later, are still pending due to indecency complaints.<sup>8</sup>

Saga concedes that some indecency complaints have merit. Where an indecency complaint is meritorious, the affected station should have the right to promptly respond to the allegations so that the Commission may adjudicate the matter. This would relieve the condition of legal limbo in which many licensees find themselves. Justice delayed is justice denied.<sup>9</sup> Adopting the triage system suggested by Saga could dramatically reduce the backlog so that broadcasters could expect prompt adjudication of indecency complaints.

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<sup>8</sup> Based on Saga's best information and belief of the reason for the holds.

<sup>9</sup> Attributed to William Ewart Gladstone.

## **Criminal Enforcement.**

Often ignored or overlooked is the basis from which stems the Commission's enforcement power over indecent broadcasts. It is the criminal statute, Title 18 U.S.C. § 1464 which provides:

**“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”**

The FCC's jurisdiction over violations of Section 1464 comes from Title 47 U.S.C. Section 312 (a)(6) which provides in pertinent part:

**“(a) Revocation of station license or construction permit**

**The Commission may revoke any station license or construction permit—**

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**(6) for violation of section 1304, 1343, or 1464 of title 18;”**

Although not the pattern and practice of the Commission in indecency enforcement, a violation of Section 312(a)(6), arguably, at least, cannot be found to have occurred unless and until there is a finding of violation of Section 1464 of Title 18. That should require an indictment and trial in a federal district court.

If the Commission were to redirect its enforcement efforts on the broadcast of obscene, indecent and profane language to the U. S. Department of Justice for prosecution, it could free up Enforcement Bureau resources to prosecute cases that severely impact the public interest like pirate broadcasting. In this manner, the government would still have the responsibility for prosecuting indecent speech, albeit the responsibility would be assumed by local U. S. Attorneys.

Saga acknowledges that licensees are responsible for the acts of their employees,<sup>10</sup> and the Commission routinely investigates complaints of indecent language uttered by licensee employees on this legal theory. However, despite a licensee's best efforts, from time to time, an employee may disregard his or her employer's directive and utter a forbidden word over the air. This cavalier attitude may be, in part, due to the employee's knowledge that few, if any persons, are ever prosecuted for uttering obscene, indecent, or profane language on a radio or television station. Uttering prohibited language is either important enough to prosecute offenders, or it is not, and the Commission's enforcement efforts should be shifted to the investigation and prosecution of other violations. If the broadcast of obscene, indecent and profane language is not important enough to merit criminal prosecution in the federal courts, a question is raised as to how the broadcast of such language can be important enough to justify the loss of a federal license or the imposition of significant forfeitures.<sup>11</sup>

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<sup>10</sup> *WSKQ Licensing, Inc.*, 27 FCC Rcd 10108 (2012).

<sup>11</sup> See: Wikipedia entry on efforts to impose forfeitures as a result of language broadcast on the "Howard Stern Show": [http://en.wikipedia.org/wiki/FCC\\_fines\\_of\\_The\\_Howard\\_Stern\\_Show](http://en.wikipedia.org/wiki/FCC_fines_of_The_Howard_Stern_Show). "The FCC broadened its guidelines in 1987 following an investigation over indecencies broadcast on the show. In 1990, Infinity Broadcasting, owner of Stern's flagship station WXRK and some of his syndication affiliates, was issued its first fine. Two penalties issued in 1992 worth \$105,000 and \$600,000 were the highest the agency had fined any broadcaster over such matters. Further violations led to almost \$2 million in fines being issued by the end of 1994. A settlement reached between the FCC and Infinity in 1995 included a \$1.715 million payment to dismiss all outstanding indecency cases."

Respectfully submitted,

SAGA COMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read 'Gary S. Smithwick', written over a horizontal line.

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